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No. 88-21, 88-43

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HENDRICKSON BROTHERS, INC.,

Petitioner,

vs.

STATE OF NEW YORK,

Respondent.

LIZZA INDUSTRIES, INC.,

Petitioner,

vs.

STATE OF NEW YORK,

Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. In a bid-rigging conspiracy on public contracts, do the submission of fraudulent non-collusion affidavits by which each bidder affirms that the bid prices were determined without collusion, that the prices have not been disclosed to a competitor, and that no attempt has been made to induce a competitor to submit or not to submit a bid, constitute affirmative acts of concealment under the doctrine of fraudulent concealment?

2. In an antitrust bid-rigging conspiracy, are affirmative acts of concealment perpetrated by one conspirator in furtherance of the conspiracy attributable to all co-conspirators for purposes of the doctrine of fraudulent concealment?

3. Can an antitrust plaintiff satisfy the wrongful concealment requirement of the fraudulent concealment doctrine by proving, *inter alia*, that participants in a bid-rigging conspiracy, in order to conceal the existence of the conspiracy, submitted prearranged losing bids, submitted fraudulent non-collusion affidavits, and agreed to limit excess profits?

PARTIES TO THE PROCEEDING

Petitioner in case No. 88-21 is Hendrickson Brothers, Inc. Petitioner in case No. 88-43 is Lizza Industries, Inc. Both petitions seek review of the same judgment.[1] Respondent is the State of New York.

[1] Amfar Asphalt Corp., Francis Ambrosio, Anthony Farino and Jack Farino were co-appellants in the appeal before the United States Court of Appeals for the Second Circuit and have not filed petitions to this Court for a writ of certiorari. Pratt and Pratt Inc., James J. Pratt and Herbert Hochreiter were defendants in the proceedings in the United States District Court for the Eastern District of New York, but were not parties to the appeal in the court of appeals.

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent State of New York respectfully requests that this Court deny the petitions for writs of certiorari seeking review of the decision of the United States Court of Appeals for the Second Circuit.

STATEMENT OF THE CASE

On February 16, 1988, the United States Court of Appeals for the Second Circuit affirmed a judgment entered by the United States District Court for the Eastern District of New York following a jury trial before the Hon. Jacob Mishler. The judgment awarded the State of New York ("State") $7,455,000 in

treble damages against petitioners Hendrickson Brothers, Inc. ("Hendrickson") and Lizza Industries, Inc. ("Lizza"), and its president Herbert Hochreiter, Amfar Asphalt Corp. ("Amfar") and its officers Francis Ambrosio, Anthony Farino, and Jack Farino ("the Amfar defendants"), and Pratt & Pratt, Inc. ("Pratt"), and its president James J. Pratt ("Guy Pratt") for conspiring to rig highway construction contracts in violation of the Sherman Act, 15 U.S.C. § 1. The court of appeals also affirmed judgments against Lizza, Hochreiter, and the Amfar defendants in the amount of $375,000 for conspiring to fix prices on construction materials contracts awarded by Suffolk County ("County") in 1978 and 1979. Finally, it affirmed the assessment of a civil penalty in the amount of $100 against each defendant for violating New York's Donnelly Act, N.Y. Gen. Bus. Law §§ 340-347 (McKinney 1968).[2] The opinion is reported at 840 F.2d 1065 (2d Cir. 1988); App. 1-38.[3]

Reviewing the proceedings below, the court of appeals concluded that the State had successfully proven the defendants' participation in the two bid-rigging conspiracies and had established the following. During the period covered by the complaint, five contracts let by the New York State Department of Transportation ("DOT") were collusively rigged by the defendants: the Veterans Memorial Highway contract ("Vets Highway") awarded to Lizza in February 1977; the Port Jefferson contract awarded to Amfar in June 1977; the Shelter Island contract awarded to Lizza in October 1977; the Long Island Expressway contract ("Expressway") awarded to Hendrickson in April 1978; and the Wantagh Avenue contract awarded to Pratt in October 1978. 840 F.2d at 1069; App. 5. Petitioners Hendrickson and Lizza were among the ringleaders of the conspiracy, referred to by the bid-riggers as the "Club of Five." 840 F.2d at 1070; App. 6-7. The "Club of Five" determined each prearranged

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[2] The State and County subsequently settled with defendants Pratt, Guy Pratt, and Hochreiter.

[3] Citations to "App. ____ " are references to the appendix to Hendrickson's petition.

contract winner, authorized the fixed contract price, imposed a 20-25% excess profit ceiling so as not to draw unwanted scrutiny, directed the other co-conspirators' role in the conspiracy, extracted kickbacks from the smaller contractors and recruited new members to the conspiracy who otherwise posed a legitimate competitive threat. 840 F.2d at 1070-72; App. 6-10.

Concealment of the conspiracy was essential to "ensure that the State would feel it had enough bids on any given contract to warrant awarding the contract immediately rather than calling for new bids." 840 F.2d at 1074; App. 13. The "Club of Five," therefore, designated certain contractors to submit prearranged losing, or accommodation bids, in order to give the appearance of competition. "Virtually all of the losing bids on these five contracts were submitted by Hendrickson, Amfar, Lizza or two other companies identified . . . as members of . . . [the] conspiracy." 840 F.2d at 1069; App. 5.

As a safeguard against collusion, DOT and the County required each bidder submitting a contract proposal to execute a non-collusive bidding certification in which the contractor affirmed under penalties of perjury that, *inter alia*:

> (1) The prices in this bid have been arrived at independently without collusion, consultation, communication, or agreement, for the purpose of restricting competition, as to any matter relating to such prices with any other bidder or with any competitor;
>
> (2) Unless otherwise required by law, the prices which have been quoted in this bid have not been knowingly disclosed by the bidder and will not knowingly be disclosed by the bidder prior to opening, directly or indirectly, to any other bidder or to any competitor; and
>
> (3) No attempt has been made or will be made by the bidder to induce any other person, partnership or corporation to submit or not to submit a bid for the purpose of restricting competition.

Furthermore, when a contract was awarded, the winning bidder had to reaffirm the absence of collusion. 840 F.2d at 1069; App. 5. Each of the bidding proposals submitted by the conspirators and each of the contracts signed by them contained non-collusion certifications that were fraudulent.

The State commenced this antitrust action on June 16, 1983, two months after several of the defendants had been indicted by a federal grand jury on charges of mail fraud in connection with the bid-rigging scheme.[4] Although the last contract had been awarded more than four years before commencement of the action, the State alleged that the four year statute of limitations (15 U.S.C. § 15b) had been tolled because the conspiracy had been fraudulently concealed. Before trial, the State argued that the defendants' submission of accommodation bids and false non-collusion certifications had fraudulently concealed the bid-rigging conspiracy. App. 50-52. The district court declined to adopt the State's argument, and ruled that the State would be required to prove acts of concealment beyond the accommodation bids and non-collusion affidavits. At trial, therefore, in addition to the non-collusion affidavits and accommodation bids, the State submitted substantial evidence of other affirmative acts of concealment committed by the Amfar defendants in furtherance of the bid-rigging conspiracy. As summarized by the court of appeals, these acts included the following:

> After Amfar entered into the bid-rigging scheme, Ambrosio instructed LoMonte[5] to remove from the office the books and documents that reflected Amfar's participation in the scheme and the extra profits thereby earned. In July 1978, after LoMonte had been arrested on an unrelated matter, which resulted in the seizure

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[4] Lizza and Hochreiter were convicted in the United States District Court for the Eastern District of New York and their convictions were affirmed in *United States v. Lizza Industries, Inc.*, 775 F.2d 492 (2d Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986). Guy Pratt and Pratt pleaded guilty to ten counts of mail fraud. Petitioner Hendrickson was not a defendant in the criminal action.

[5] Co-conspirator Joseph LoMonte was Amfar's vice-president and controller and the State's principal witness at trial.

> of a ledger documenting Amfar's unreported cash transactions, including kickbacks to several of the coconspirators, he met with Ambrosio, Farino, and Anthony Farino to assess the situation. They discussed the documents that reflected the bid rigging and agreed that "it wouldn't be wise for any of us to talk." The Farinos suggested that the best way to get rid of the telltale documents would be to burn them. Many of the documents were thereafter burned; Amfar purchased a shredder to destroy the rest. The four men also agreed that LoMonte would give false testimony if called before a grand jury, and he did so.

840 F.2d at 1084; App. 33.

In affirming, the court of appeals rejected the defendants' statute of limitation claim and stated that a plaintiff may prove wrongful concealment "by showing either that the defendant took affirmative steps to prevent the plaintiff's discovery of his claim or injury or that the wrong itself was of such a nature as to be self-concealing." 840 F.2d at 1083; App. 32.[6] The court held that:

> the State sufficiently proved the concealment by the defendants of the conspiracies alleged in the complaint, both because the bid-rigging was self-concealing and because the Amfar defendants' affirmative acts of concealment were properly admissible against all of the defendants.

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[6] In considering the defendants' claim, the court recited the three-part test that an antitrust plaintiff must satisfy in order to invoke the doctrine of fraudulent concealment:

> (1) that the defendant concealed from him the existence of his cause of action, (2) that he remained in ignorance of that cause of action until some point within four years of the commencement of his action, and (3) that his continuing ignorance was not attributable to lack of diligence on his part.

840 F.2d at 1083; App. 31. Petitioners agree that this is a proper statement of the test and that only the first of the three requirements is at issue here. (Hendrickson Br. at 5, Lizza Br. at 12).

840 F.2d at 1085; App. 34. The court found that the bid-rigging scheme fit squarely within the framework of a self-concealing conspiracy that must remain concealed in order to be successful because of a number of factors, including the agreement to limit excess profits, the submission of accommodation bids, and the submission of false non-collusion affidavits. 840 F.2d at 1084; App. 33. It concluded that the Amfar defendants' affirmative acts of concealment were attributable to all of the co-conspirators, including petitioners, because they were committed in the course of and in furtherance of the conspiracies. 840 F.2d at 1085; App. 34.

The court denied a petition for rehearing, containing a suggestion that the action be reheard *en banc*, on April 7, 1988. App. 39.

REASONS WHY THIS COURT SHOULD DENY THE PETITIONS

This Court need not address the questions petitioners present because, contrary to their assertions, Hendrickson and Lizza each committed affirmative acts of concealment by submitting fraudulent non-collusion affidavits with each rigged bid proposal and by falsely reaffirming the absence of collusion each time they entered into a contract. Affirmative acts of concealment toll the statute of limitations under the fraudulent concealment doctrine in every circuit that has ruled on the matter.

In any event, by attributing the affirmative acts of concealment committed by the Amfar defendants to their co-conspirators Hendrickson and Lizza, the court of appeals merely applied settled conspiracy law — that the acts of one conspirator in furtherance of the conspiracy are attributable to all co-conspirators. This holding is consistent with the decisions of this Court and petitioners do not cite any federal court of appeals' decision to the contrary.

Finally, the conclusion by the court of appeals that the bid-rigging conspiracy in this case was "self-concealing" is based on facts established at trial which would satisfy the fraudulent

concealment doctrine in all other federal appellate courts. This bid-rigging conspiracy included the submission of accommodation bids, the submission of non-collusion affidavits and an agreement to limit excess profits. These acts were in addition to those necessary to rig bids and were committed for the purpose of keeping the conspiracy concealed. These actions meet the fraudulent concealment test of every circuit whether a self-concealing theory or affirmative acts standard is applied. No applicable decisions of this Court are in conflict.

I.

BECAUSE HENDRICKSON AND LIZZA EACH COMMITTED AFFIRMATIVE ACTS OF CONCEALMENT SUFFICIENT TO TOLL THE STATUTE OF LIMITATIONS, THE QUESTIONS OF WHETHER THEIR CO-CONSPIRATORS' ACTS OF CONCEALMENT CAN BE ATTRIBUTED TO THEM, AND WHETHER THIS CONSPIRACY WAS SELF-CONCEALING, ARE NOT PROPERLY PRESENTED

This Court need not address the questions presented by Hendrickson and Lizza because, contrary to their assertions, each contractor committed affirmative acts of concealment sufficient to toll the statute of limitations. In its decision, the Court of Appeals for the Second Circuit recognized that the contractors' submission of non-collusion affidavits with each rigged bid constituted an affirmative act "performed . . . to conceal the conspiracy." 840 F.2d at 1084; App. 34. This determination is in accord with a very recent decision of the Court of Appeals for the Fifth Circuit in a bid-rigging case. *Texas v. Allan Construction Co.*, No. 87-1766, (5th Cir. Aug. 17, 1988) (available Aug. 17, 1988 on WESTLAW CTA5 library at 9). No decisions of this Court or any other federal court of appeals is in conflict.

In their non-collusion affidavits both Hendrickson and Lizza affirmed independently under penalties of perjury[7] that the

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[7] By executing a fraudulent non-collusion bidding certification in New York, a contractor can be prosecuted not only for perjury, but also for the independent crime of offering a false instrument for filing in the first degree. N.Y. Penal Law § 175.35 (McKinney 1975).

prices in their bids were not the product of collusion, that they had not disclosed the prices to a competitor, and that they had not made any attempt to induce a competitor to submit or not to submit a bid. Hendrickson committed six affirmative acts of concealment. It submitted false non-collusion affidavits with its accommodation bids on the Vets Highway, Port Jefferson, Shelter Island, and Wantagh Avenue contracts. 840 F.2d at 1069-71; App. 5-8. Hendrickson also submitted a fraudulent non-collusion affidavit with its predetermined winning bid on the Long Island Expressway contract and falsely reaffirmed the absence of collusion when it signed the contract. *Id.*

Lizza committed at least seven affirmative acts of concealment. Lizza submitted a false non-collusion affidavit with its accommodation bid on the Port Jefferson contract. It submitted false non-collusion affidavits with its winning bids on the Vets Highways and Shelter Island projects and falsely reaffirmed the absence of collusion when it signed each contract. Lizza also submitted false non-collusion affidavits on the two rigged County materials contracts. 840 F.2d at 1069-71; App. 5-8.

These multiple acts of concealment committed by petitioners Hendrickson and Lizza, which constitute separate criminals acts, would meet the affirmative acts test in any circuit. The questions petitioners raise, therefore, whether their co-conspirators' acts of concealment can be attributed to them, and whether this conspiracy was self-concealing, are not properly presented.

II.

THE HOLDING OF THE COURT BELOW THAT THE AFFIRMATIVE ACTS OF CONCEALMENT PERPETRATED BY THE AMFAR DEFENDANTS IN FURTHERANCE OF THE BID-RIGGING CONSPIRACY WERE ATTRIBUTABLE TO CO-CONSPIRATORS HENDRICKSON AND LIZZA IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND IS NOT IN CONFLICT WITH THE DECISIONS OF OTHER FEDERAL COURTS OF APPEALS

The court of appeals' decision attributing the Amfar defendants' affirmative acts of concealment to co-conspirators Hendrickson and Lizza neither conflicts with the decisions of this Court or other federal courts of appeals nor presents an important question of federal law which should be determined by this Court. The court of appeals merely applied settled conspiracy law that acts of a conspirator in furtherance of the conspiracy are attributable to all co-conspirators regardless of whether they authorized or had knowledge of the acts. *Lutwak v. United States*, 344 U.S. 604, 618 (1953); *Pinkerton v. United States*, 328 U.S. 640, 646-47 (1946); *Hyde v. United States*, 225 U.S. 347, 369 (1912); *United States v. Kissel*, 218 U.S. 601, 608 (1910).

In their efforts to frame an issue appropriate for review by this Court, petitioners misconstrue the record in two important respects and attempt to argue questions of fact. First, they contend that the acts of concealment occurred after the objectives of the conspiracy had been accomplished. (Hendrickson Br. at 17, Lizza Br. at 19-20). The court of appeals concluded, however, that there was ample evidence to support the jury's factual determination that

> both the NYSDOT contracts conspiracy and the County materials contracts conspiracy remained in existence at the time the Amfar defendants destroyed documentary evidence and initiated the fabrication of false testimony.

840 F.2d at 1084-85; App. 34.

Second, they assert that the acts of concealment were beyond the "reasonable intendment" of the objectives of the conspiracy. (Hendrickson Br. at 16, Lizza Br. at 18). This is incorrect because the court of appeals held that there was sufficient evidence to support the finding that active concealment of the conspiracy was essential to its success since the conspiracy continued over an extended period of time and involved a number of contracts.

> Given the continuation of the two conspiracies and the fact that secrecy was essential to their continued existence, it was entirely appropriate for the court to allow use of the Amfar defendants' actions against the other coconspirators – even if the latter did not know of the actions – since they were acts in furtherance of the conspiracies.

840 F.2d at 1085; App. 34 (citations omitted).

The decision of the court of appeals is entirely consistent with the decisions of this Court. In *Grunewald v. United States*, 353 U.S. 391 (1957), this Court recognized that acts of concealment can have significance in furthering a conspiracy where "the successful accomplishment of the crime necessitates concealment," 353 U.S. at 405, and that a "vital distinction must be made between acts of concealment done in furtherance of the *main* objectives of the conspiracy and acts of concealment done after these central objectives have been obtained for the purpose only of covering up after the crime." *Id.* (emphasis in original). Here, the successful accomplishment of the bid-rigging conspiracy necessitated concealment and the acts were done in furtherance of its main objectives while the conspiracy remained in existence.

The decision by the court of appeals, attributing the acts of concealment of one antitrust conspirator to them all for purposes of the doctrine of fraudulent concealment, is also consistent with a recent decision of the only other court of appeals

to address the specific issue.[8] In *Pinney Dock & Transport Co. v. Penn. Central Corp.*, 838 F.2d 1445 (6th Cir. 1988), *petition for cert. filed*, 57 U.S.L.W. 3075 (U.S. July 11, 1988) (No. 88-72),[9] the court of appeals employed the test articulated by the district court that "one means of wrongful concealment of an ongoing antitrust conspiracy is a co-conspirator's fraudulent misrepresentations." 838 F.2d at 1474. If a defendant's fraudulent misrepresentations toll the statute of limitations for his co-conspirators, certainly the burning and shredding of documents and fabrication of false testimony, which occurred here, does so as well.

III.

THE HOLDING OF THE COURT BELOW THAT FRAUDULENT CONCEALMENT WAS ESTABLISHED BECAUSE THE BID-RIGGING CONSPIRACY IN THIS CASE WAS SELF-CONCEALING IS NOT IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS INCLUDING THOSE WHICH REQUIRE AFFIRMATIVE ACTS OF CONCEALMENT

The decision by the court of appeals that fraudulent concealment was established because this particular bid-rigging

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[8] The affirmance by the Court of Appeals for the Tenth Circuit of the district court's decision by an evenly divided court sitting *en banc*, *Colorado ex rel. Woodard v. Western Paving Construction Co.*, 841 F.2d 1025 (10th Cir. 1988), *vacating* 833 F.2d 867 (1987), *petition for cert. filed*, 56 U.S.L.W. 3881 (U.S. June 8, 1988) (No. 87-2027) has no precedential value. *United States v. Gomez*, 810 F.2d 947, 957 (10th Cir.), *cert. denied*, 107 S.Ct. 2488 (1987); *Loeffler v. Tish*, 806 F.2d 817, 818 (8th Cir. 1986), *petition for cert. granted on other grounds*, 107 S. Ct. 3227 (1987); *United States v. Baldwin*, 691 F.2d 718, 722 (5th Cir. 1982); *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1069 n. 49 (D.C. Cir. 1981). *See also Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 759 n.5 (1984). This is consistent with the weight this Court gives its own equally divided decisions. *Neil v. Biggers*, 409 U.S. 188, 192 (1972).

[9] The interlocutory petition in *Pinney Dock* raises procedural claims not relevant to any of the issues presented by petitioners here.

conspiracy was self-concealing, is unexceptional and consistent with the rulings in other circuits. In evaluating an antitrust plaintiff's claim of fraudulent concealment, courts of appeals have formulated two methods of analysis. In the Second Circuit, as reflected by this decision, as well as in the Seventh and the Tenth Circuits, a plaintiff may satisfy the wrongful concealment requirement by demonstrating that the particular antitrust conspiracy alleged was self-concealing.[10] In the First, Fourth, Fifth, Sixth, Eighth, and Ninth Circuits, a plaintiff must show some affirmative conduct directed at concealing the cause of action in order to toll the statute of limitations.[11] In a case such as this, however, regardless of the label attached, the results of the analysis are the same. Here, in particular, the proof established compelled the Court of Appeals for the Second Circuit to find fraudulent concealment under both the "self concealing" theory and "affirmative acts" test.

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[10] *See, e.g., Baker v. F & F Investment*, 420 F.2d 1191, 1199 (7th Cir.) *cert. denied*, 400 U.S. 821 (1970); *King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147, 1156 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982). The Court of Appeals for the District of Columbia has employed the self-concealing theory in a civil rights case, *Hobson v. Wilson*, 737 F.2d 1, 33-34 & n.102 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985), while the Eleventh Circuit and the Temporary Emergency Court of Appeals have recognized that certain wrongs are self-concealing. *Hill v. Texaco Inc.*, 825 F.2d 333, 335 n.2 (11th Cir. 1987); *Ashland Oil Co. v. Union Oil Co.*, 567 F.2d 984, 988 (Temp. Emer. Ct. App. 1977), *cert. denied*, 435 U.S. 994 (1978). As noted in n.8 above, affirmance by the Court of Appeals for the Tenth Circuit of the district court's decision by an evenly divided court sitting *en banc* in *Woodard* has no precedential value.

[11] *See, e.g., Berkson v. Del Monte Corp.*, 743 F.2d 53, 56 (1st Cir. 1984), *cert. denied*, 470 U.S. 1056 (1985); *Pocahontas Supreme Coal Co. v. Bethlehem Steel*, 828 F.2d 211, 219 (4th Cir. 1987); *Texas v. Allan Construction Co.*, No. 87-1766 (5th Cir. Aug. 17, 1988) (available Aug. 17, 1988 on WESTLAW CTA5 library at 7); *Pinney Dock & Transport Co. v. Penn Central Corp.* 838 F.2d 1445, 1465-80 (6th Cir. 1988), *petition for cert. filed*, 57 U.S.L.W. 3075 (U.S. July 11, 1988) (No. 88-72); *Kansas City, Missouri v. Federal Pacific Electric Co.*, 310 F.2d 271, 278 (8th Cir.), *cert. denied*, 371 U.S. 912 (1962); *Rutledge v. Boston Hose & Rubber Co.*, 576 F.2d 248, 250 (9th Cir. 1978). The Third Circuit apparently has not decided which analysis applies to questions of federal law.

The court below characterized this bid-rigging conspiracy as self concealing because of a number of factors all designed to insure the secrecy of the scheme, including the submission of non-collusion affidavits, accommodation bids, and an agreement to limit excess profits. 840 F.2d at 1084; App. 33. These actions, which went well beyond merely rigging the bids, are precisely the sort of deceptive conduct required by the affirmative acts test.[12]

Petitioners' contention that the questions presented require review relies heavily on their claim that there is an irreconciliable conflict between the decision of the court below and the recent decision in *Pinney Dock & Transport Co.* Had this case been tried in the Sixth Circuit, however, the issue of the petitioners' fraudulent concealment would have been just as conclusively decided against them. Discussing the type of conduct sufficient for purposes of affirmative concealment, the *Pinney Dock* court turned to a bid-rigging case, *Ingram Corp. v. J. Ray McDermott & Co.*, 1980-1 Trade Cas. (CCH) ¶ 63,277 (E.D. La. 1980), *rev'd on other grounds*, 698 F.2d 1295 (5th Cir. 1983), as an example:

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[12] Indeed, the Court of Appeals for the Eighth Circuit ruled in a price-fixing case that allegations of secret meetings, the use of public pay phones, concealment or destruction of documents, and use of a code to conceal bid-rigging activities, if proven, would constitute affirmative acts of concealment. The court held further:

> We are not persuaded to believe that Congress meant to proscribe and outlaw conspiracies and combinations in restraint of trade, only to reverse itself by enacting a statute of limitations that would reward successful conspirators. When the antitrust laws are violated, the wrongdoers who are successful in cloaking their unlawful activities with secrecy through cunning, deceptive and clandestine practices should not, when their machinations are discovered, be permitted to use the shield of the statute of limitations to bar redress by those whom they have victimized.

Kansas City, Missouri v. Federal Pacific Electric Co., 310 F.2d 271, 284 (8th Cir.), *cert. denied*, 371 U.S. 912 (1962).

> The affirmative acts referred to [in *Ingram*] . . . included submitting prearranged losing bids by the company that had agreed not to receive the award, in order to give the illusion of competition among the corporate defendants, and maintaining agreed-upon ratios of major equipment spreads and positioning equipment in particular localities throughout the world so as to give the the false impression that excessive bids on particular projects were the result of equipment availability rather than of the unlawful conspiracy.

838 F.2d at 1473. The affirmative acts committed by the petitioners in this case are at least as misleading and constitute "precisely the sort of affirmative act of deception required by the jurisprudence." *Ingram Corp. v. J. Ray McDermott & Co.*, 1980-1 Trade Cas. (CCH) ¶ 63,277 at 78,414.

The functional identity between the self-concealing theory applied by the court below and the affirmative acts test utilized in other circuits is clearly demonstrated by a recent decision of the Court of Appeals for the Fifth Circuit. In *Texas v. Allan Construction Co.*, No. 87-1766 (5th Cir. Aug. 17, 1988) (available Aug. 17, 1988 on WESTLAW CTA5 library), the Fifth Circuit, while ruling that a bid-rigging conspiracy is not inherently self-concealing, held nonetheless that a plaintiff may satisfy the affirmative acts test by proof that the conspirators submitted non-collusion affidavits, conducted covert meetings and submitted accommodation bids. *WESTLAW* op. at 7-9. Thus the very same proof, established by the State in this case, satisfies both concealment standards.

Finally the decision of the court below that the bid-rigging conspiracy in this case was self-concealing is entirely consistent with the applicable decisions of this Court. This Court has long recognized that:

> To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead

> the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure.

Bailey v. Glover, 88 U.S. (21 Wall.) 342, 349 (1874). Here the court of appeals merely applied this Court's holding in *Bailey* that where a fraud which is the foundation of the suit, "is of such character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him." 88 U.S. (21 Wall.) at 349-350.[13] Petitioners have failed to offer a reason for witholding application of *Bailey* to a conspiracy such as the one proven below which was based on repeated and intentional, material misrepresentations designed to conceal the conspiracies' existence, and which has resulted in damage to the public as represented by respondent.

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[13] Although the court of appeals in *Pinney Dock* ruled that the antitrust conspiracy alleged could not be self-concealing because it was not based on fraud, 838 F.2d at 1472, it does not follow that a bid-rigging conspiracy which is in the nature of fraud could never be self-concealing. Indeed, several courts of appeals have held that bid-rigging conspiracies on publicly-funded projects constitute schemes to defraud under 18 U.S.C. § 1341 as well as violations of the Sherman Act, particularly where fraudulent non-collusion affidavits have been submitted. *See, e.g., United States v. Washita Construction Co.*, 789 F.2d 809, 817 (10th Cir. 1986); *United States v. Rodgers*, 624 F.2d 1303 (5th Cir. 1980), *cert. denied*, 450 U.S. 917 (1981); *United States v. Azzarelli Construction Co.*, 612 F.2d 292, 298 (7th Cir. 1979), *cert. denied*, 447 U.S. 920 (1980). Moreover the United States Department of Justice Antitrust Guidelines for International Operations (Draft Revision June 8, 1988), 53 Fed. Reg. 21584, 21588 n.51 (1988), state that in addition to prosecution under the Sherman Act, naked horizontal agreements such as bid-rigging schemes may also be prosecuted under federal statutes outlawing fraud, such as mail and wire fraud, 18 U.S.C. §§ 1341, 1343, conspiracy to defraud the government, 18 U.S.C. § 371 and making false statements to a government agency 18 U.S.C. § 1001.

CONCLUSION

For all the foregoing reasons, this Court should deny both petitions for writs of certiorari.

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New York, New York

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